

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

**In the Matter of:**

**DETROIT METROPOLITAN-  
WAYNE COUNTY AIRPORT**

FAA Order No. 94-32

Served: October 5, 1994

Docket No. CP94GL0032

**ORDER**

Complainant filed a Notice of Interlocutory Appeal of Right on July 27, 1994, pursuant to 14 C.F.R. § 13.219(c)(3),<sup>1</sup> challenging the order to show cause of Administrative Law Judge Robert L. Barton, Jr., issued on July 12, 1994.<sup>2</sup>

Complainant argues in its appeal brief that the law judge in his order to show cause "threatened" to refer agency counsel to state bar disciplinary proceedings if the order was not complied with. Complainant argues that the law judge's alleged threat<sup>3</sup> constitutes a sanction not permitted by the Rules of Practice under 14 C.F.R. § 13.205(b).<sup>4</sup>

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<sup>1</sup> Section 13.219(c)(3) of the Rules of Practice, 14 C.F.R. § 13.219(c)(3), provides in relevant part: "A party may file an interlocutory appeal with the FAA Decisionmaker, without the consent of the administrative law judge, before an initial decision has been entered in the case of: ... a ruling or order by the administrative law judge in violation of § 13.205(b) of this subpart."

<sup>2</sup> A copy of the law judge's order is attached.

<sup>3</sup> Complainant supports its characterization of the law judge's actions as a threat by attaching as Exhibit "F" to its appeal brief an order issued by this same law judge in another case. Complainant maintains that the situations in the two cases are substantially alike.

<sup>4</sup> Section 13.205(b), 14 C.F.R. § 13.205(b), provides in pertinent part:

Limitations on the power of the administrative law judge. The administrative law judge shall not issue an order of contempt, award costs to any party, or impose any sanction not specified in this subpart.

The order to show cause in question stated in pertinent part:

Furthermore, within fifteen days of the date of this Order, Complainant and Complainant's counsel ... are ordered:

1. to show cause why sanctions should not be imposed on Complainant for deliberating [*sic*] refusing to comply with prior Orders;
2. to show cause why (counsel) should not be found to have engaged in "obstreperous or disruptive behavior" as that term is used in 14 C.F.R. § 13.205(b) and barred from any further participation in this proceeding;
3. to state the name, address and title of any supervisory attorneys at the FAA who reviewed and/or approved the agency responses in this case dated May 6, 1994 and June 29, 1994; and
4. to list all state bars of which (counsel) is presently a member and any identification number assigned to him as a member of each such bar.

Failure to comply fully with this Order will be construed as evidence of obstreperous behavior.

On appeal, Complainant argues that the actions ordered in paragraphs 3 and 4 of the law judge's order constitute threats that represent impermissible sanctions under the Rules of Practice.

The order to show cause followed Complainant's refusal to list specific civil penalty amounts for each complaint allegation as ordered by the law judge in two prior orders.<sup>5</sup> In the order to show cause the law judge also stated that he would consider dismissing the complaint unless Complainant filed an amended

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<sup>5</sup> The complaint in this case seeks a total civil penalty of \$5,000 from Respondent for alleged violations of its approved airport security program (AASP) identification procedures. In his order of April 19, 1994, the law judge ordered Complainant to state: 1. how many violations it alleged in the complaint, 2. how it arrived at the number of violations, and 3. the amount of civil penalty sought as to each violation alleged. In its response of May 6, 1994, Complainant stated that it alleged 12 violations. Complainant explained how it arrived at the 12 violations, but did not state a civil penalty amount for each alleged violation. On June 10, 1994, the law judge ordered Complainant to state with respect to each complaint allegation: 1. the name of the individual who failed to display the badge, 2. the specific AASP provision violated, and 3. the specific amount of civil penalty sought with respect to each violation. On June 29, 1994, Complainant responded listing the names of the 12 individuals and the corresponding sections of the AASP violated. Complainant did not assign a specific civil penalty for each alleged violation, stating that it based the total \$5,000 civil penalty on Respondent's overall conduct and the facts and circumstances of the case. Complainant stated further that precise apportionment of the civil penalty for each violation alleged was "not necessary" under the holding in In the Matter of Pony Express, FAA Order No. 94-19 (June 22, 1994).

complaint or other pleading assigning a specific civil penalty amount for each alleged violation. However, the issue of whether each allegation in a complaint should state a corresponding civil penalty amount is not before me in this interlocutory appeal because Complainant has not raised it, and in any event, the scope of an interlocutory appeal is narrow. See In the Matter of Alaska Airlines, Inc., FAA Order No. 91-54 at 9 (November 6, 1991). (The Administrator declined to review all issues except whether the law judge exceeded his authority in imposing a sanction because to do so would have exceeded the scope of review of the interlocutory appeal of right.)

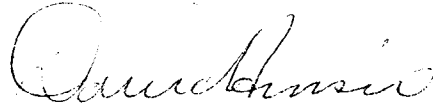
Complainant's interlocutory appeal must be dismissed because it is premature. Even assuming that the order to show cause may be interpreted to contain a threat by the law judge to refer agency counsel to state bar disciplinary proceedings unless the complaint is amended, and that such a referral would be an impermissible sanction not authorized under the Rules of Practice, no such referral has yet been made.<sup>6</sup> Indeed, Complainant's response to the order to show cause may well persuade the law judge not to take any action against Complainant or the agency attorney as an individual. Complainant cannot appeal from a contemplated action by a law judge that has not yet occurred. Thus, Complainant's appeal is not ripe. See Air California v. United States Department of Transportation, 654 F.2d 616, 622 (9th Cir. 1981) (where the actions appealed consisted of the findings of an investigatory hearing and advisory letters that did not require specific action, the harm complained of at such time was speculative, and the issues

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<sup>6</sup> Referral of attorneys to state bar disciplinary proceedings is not one of the sanctions provided in the Rules of Practice.

were unripe for determination by the court).<sup>7</sup>

Accordingly, Complainant's interlocutory appeal of right is dismissed, and the case is remanded to the law judge for further proceedings. The law judge should give Complainant additional time to respond to the order to show cause.



DAVID R. HINSON, ADMINISTRATOR  
Federal Aviation Administration

Issued this 5th day of October, 1994.

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<sup>7</sup> The standoff in this case between Complainant and the law judge may be resolved if Complainant submits the amended pleading sought by the law judge, noting its objections to listing specific civil penalty amounts for each complaint allegation. Complainant is entitled subsequently to appeal the issue if the law judge's initial decision is not in its favor. See In the Matter of American Airlines, FAA Order No. 89-6 at 4 n.4 (December 21, 1989) (a party may appeal an adverse discovery ruling in the appeal of an adverse initial decision if that ruling affected the law judge's ultimate decision). Alternatively, the Complainant may choose to refuse to assign specific civil penalty amounts to each allegation in the complaint. In that case, if the law judge continues to believe that his order to do so is reasonable and appropriate, then the appropriate response for him would be to dismiss the complaint, and Complainant, of course, could then appeal the dismissal. Either one of these options will permit review of the underlying legal issue of whether each complaint allegation must list a corresponding civil penalty amount.

Although the law judge may bar a person from a proceeding based on a finding of "obstreperous or disruptive" behavior under 14 C.F.R. § 13.205(b), the meager record to date - two written responses to discovery orders - does not demonstrate conduct that appears to rise to such levels. Cf. Ubioteca Corporation v. FDA, 427 F.2d 376, 382 (6th Cir. 1970) (the hearing examiner's decision to exclude counsel from the hearing for contemptuous behavior because he failed to follow directions during cross-examination, making an orderly hearing impossible, was sustained by the record).